

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
JACK'S TOURS, INC.)
for Extension of Motor Carrier)
Certificate.)
_____)

Docket No. 05-0159

ORDER NO. 22301

Filed Feb. 28, 2006
At 9:30 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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STATE OF HAWAII

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In the Matter of the Application of)	
JACK'S TOURS, INC.)	Docket No. 05-0159
for Extension of Motor Carrier)	Order No. 22301
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ORDER

By this Order, the commission denies the motions to intervene filed by PHT, Inc. ("PHT"), Akina Aloha Tours, Inc. ("Akina Aloha"), Akina Bus Service, Ltd. ("Akina Bus"), Robert's Tours & Transportation, Inc. ("Robert's"), Kauai Island Tours, Inc. ("KIT"), E Noa Corporation ("E Noa"), V.I.P. Transportation, Inc. ("VIP"), and Polynesian Adventure Tours, Inc. ("Polynesian") (collectively, "Movants") in the matter of the application of JACK'S TOURS, INC. ("Jack's") for an expansion of its motor carrier certificate to include the islands of Kauai, Oahu and Maui in the 1-to-7, 8-to-25, and over-25 passenger classifications ("Application").

I.

Background

A.

Application

By Application filed on June 27, 2005, and amended on July 7, 2005, July 18, 2005, and July 28, 2005, Jack's requested

approval from the commission to expand its motor carrier authority to include the islands of Kauai, Oahu and Maui in the 1-to-7, 8-to-25, and over-25 passenger classifications. Applicant currently holds motor carrier authority to operate on the island of Hawaii, excluding Waipio Valley, in the 1-to-7, 8-to-25 and over-25 passenger classifications.

B.

Motions to Intervene

1.

PHT

On August 15, 2005, PHT filed a motion to intervene in this proceeding ("PHT's Motion"). According to PHT, it is a "duly certificated common carrier with motor vehicles in the passenger categories 1 to 7, 8 to 25 and over 25 on the islands of Oahu and Maui."¹ PHT asserts that it has an interest in the instant proceeding because the services that Jack's proposes to offer are already provided by PHT. According to PHT, the services proposed by Jack's "are not and will not be required by the present or future public convenience and necessity," and Jack's proposed services are "not consistent with the public interest and transportation policy of the State of Hawaii and will not foster sound economic conditions" as set forth in Hawaii Revised Statutes ("HRS") § 271.²

¹PHT's Motion at 3.

²Id.

On August 23, 2005, Jack's filed a Statement of Opposition to the Motion to Intervene ("Jack's Opposition to PHT's Motion"). Jack's asserts that PHT has not made a showing sufficient to establish an interest to participate in the instant proceeding, but rather, has made "broad, conclusory demands for relief."³ Jack's also argues that the commission "has recently taken a position of near uniform denial of attempts to obtain intervenor or participant status in motor carrier service proceedings" and cites numerous instances where the commission has denied Jack's intervenor status in motor carrier applications.⁴

2.

Akina Aloha

On August 22, 2005, Akina Aloha filed a motion to intervene in this proceeding ("Akina Aloha's Motion"). Akina Aloha contends that it is "a duly certified common carrier by motor vehicle over irregular routes in the 1-to-7 and 8-to-25 passenger classifications, and over regular routes in the 8-to-25 passenger classification on the island of Maui."⁵ It asserts, among other things, that it desires to intervene in the instant proceeding because: (1) Jack's will be competing directly with Akina Aloha; (2) there are no existing parties

³Jack's Opposition to PHT's Motion at 2.

⁴Id. at 3.

⁵Akina Aloha's Motion at 1.

representing Akina Aloha's interests; (3) its participation will assist in the development of a sound record and will not unduly broaden or delay the instant proceeding; and (4) granting Jack's Application will not foster sound economic conditions in the transportation industry.

On August 24, 2005, Jack's filed a Statement of Opposition to Akina Aloha Tours, Inc.'s Motion to Intervene ("Jack's Opposition to Akina Aloha's Motion") in which Jack's argues that Akina Aloha makes "broad, conclusory demands for relief" rather than stating the facts and reasons for the proposed intervention, as required by Hawaii Administrative Rules ("HAR") § 6-61-55.⁶ Moreover, Jack's asserts that "[c]onclusory assertions and declarations, with no factual or substantive support, do not meet the requirements of HAR § 6-61-55."⁷ Jack's also argues that the commission "has recently taken a position of near uniform denial of attempts to obtain intervenor or participant status in motor carrier service proceedings" and cites numerous instances where the commission has denied Jack's intervenor status in motor carrier applications.⁸

⁶Jack's Opposition to Akina Aloha's Motion at 2.

⁷Id. at 3.

⁸Id.

Akina Bus

On August 22, 2005, Akina Bus filed a motion to intervene in the instant proceeding ("Akina Bus Motion"). According to Akina Bus, it is a "duly certified common carrier by motor vehicle over regular and irregular routes in the over-25 passenger classification" and also authorized in the specific commodities classification to transport baggage on the island of Maui.⁹ Akina Bus states that it is interested in intervening in the instant proceeding because Jack's "is applying to extend its authority on . . . Maui."¹⁰ It asserts that if the commission grants Jack's the authority to extend its motor carrier authority to the island of Maui, Jack's will be in direct competition with Akina Bus. Additionally, among other things, Akina Bus fears that direct competition by Jack's will result in decreasing numbers of passengers being carried by Akina Bus and as a consequence, a loss of revenue for Akina Bus and argues that granting Jack's Application will not foster sound economic conditions within the transportation industry.

Jack's did not file a statement in opposition to Akina Bus' Motion.

⁹ Akina Bus Motion at 1.

¹⁰ Id.

Robert's

On August 22, 2005, Robert's filed a Motion to Intervene in the instant proceeding ("Robert's Motion"). According to Robert's, it is a "duly certified common carrier by motor vehicle in the passenger classifications of 1-to-7, 8-to-25 and over-25 on the islands of Oahu, Maui, Hawaii and Kauai."¹¹ Robert's has an interest in intervening in this proceeding because Jack's is applying to extend its motor carrier authority to the islands of Oahu, Maui and Kauai, where Robert's currently operates. Robert's asserts that, should the commission grant Jack's request for extension of its motor carrier authority, Jack's will be in direct competition with Robert's, which would decrease the number of Robert's passengers and result in a loss of revenue, that no existing parties will represent its interest in this matter, and that a grant of intervention to Robert's would not result in undue delay of the proceeding or broaden the issues.

On August 26, 2005, Jack's filed a Statement of Opposition to Robert's Tours and Transportation, Inc.'s Motion to Intervene ("Jack's Opposition to Robert's Motion"). Jack's contends that Robert's has not made a showing sufficient to establish Robert's interest in the instant proceeding. It asserts that, "as movant, [Robert's] is not simply authorized to make broad, conclusory demands for relief", that HAR § 6-61-55

¹¹Robert's Motion at 1.

requires a specific statement of the facts and reasons for the proposed intervention along with the position and interest of the movant, and that Robert's has not met the standard for intervention set forth in HAR § 6-61-55.¹² Additionally, Jack's argues that the commission "has recently taken a position of near uniform denial of attempts to obtain intervenor or participant status in motor carrier service proceedings" and cites numerous instances where the commission has denied Jack's intervenor status in motor carrier applications.¹³

5.

KIT

On August 25, 2005, KIT filed a motion to intervene in the instant proceeding ("KIT's Motion"). According to KIT, it is a "duly certificated common carrier by motor vehicles over irregular routes in the 1-to-7, 8-to-25, and over-25 passenger classifications on the island of Kauai."¹⁴ KIT asserts that it has an interest in the instant proceeding because the services proposed to be rendered by Jack's are already provided by KIT. It contends that this direct competition by Jack's "will cause a diminution in the number of passengers now being carried by KIT and result in a loss of revenue to KIT" and contends that

¹²Jack's Opposition to Robert's Motion at 2-3.

¹³Id. at 3.

¹⁴KIT's Motion at 1.

approving Jack's Application would not be conducive to sound economic conditions within the transportation industry.¹⁵

On August 24, 2005, Jack's filed a Statement of Opposition to Kauai Island Tours, Inc.'s Motion to Intervene ("Jack's Opposition to KIT's Motion") in which Jack's contends that KIT has not made a showing sufficient to establish its interest in the instant proceeding.¹⁶ Jack's asserts that, "as movant, KIT is not simply authorized to make broad, conclusory demands for relief" and that HAR § 6-61-55 requires a specific statement of the facts and reasons for the proposed intervention along with the position and interest of the movant.¹⁷ Jack's contends that KIT has not met the standard for intervention set forth in HAR § 6-61-55. Additionally, Jack's states that the commission "has recently taken a position of near uniform denial of attempts to obtain intervenor or participant status in motor carrier service proceedings" and cites numerous instances where the commission has denied Jack's intervenor status in motor carrier applications.¹⁸

¹⁵Id. at 2.

¹⁶Although KIT's Motion was filed at the commission on August 25, 2005, the certificate of service indicates that it was duly served by United States mail on Jack's on August 15, 2005.

¹⁷Jack's Opposition to KIT's Motion at 2.

¹⁸Id. at 3.

E Noa

On August 25, 2005, E Noa filed a motion to intervene in the instant proceeding ("E Noa's Motion"). E Noa states that "it has critical statutory and other rights to participate in this proceeding" given the fact that Jack's proposed expansion of motor carrier services to Oahu and Maui come at a time when E Noa believes there are already adequate facilities on both islands to serve the public's transportation needs and that "Applicant's services will further saturate the market."¹⁹

E Noa asserts that it has considerable property and financial interests, which will be affected should the commission approve Jack's request to extend its motor carrier service. E Noa claims that it "runs and maintains a fleet of over ninety (90) vehicles on Oahu" and its leased baseyard, used to run and maintain its vehicles, "represents a large significant long-term investment" by E Noa.²⁰

E Noa speculates that should Jack's attempt to enter into the cruise ship industry on Oahu, it would impact heavily on E Noa, which currently "caters to the luxury cruise-liners that service Oahu with one of E Noa's major stops at the Aloha Tower Marketplace where the ships embark and disembark passengers."²¹ It is also concerned with the potential negative effects from "equipment modifications and changes to include trolleys late in

¹⁹E Noa's Motion at 6.

²⁰Id.

²¹Id. at 7.

another motor carrier's application process."²² It claims that "[b]ecause of the highly specialized nature and public safety aspects of trolley services, it is imperative that these matters be fully ferreted out and appropriate limitations to motorcoach service be openly examined"²³

E Noa cited the following concerns with Jack's and the Application: (1) the number of "non-active" versus "stored" vehicles Jack's is in possession of, and how many of these vehicles are in suitable condition for public transportation, is unclear; (2) there are "significant financial and operational concerns with Jack's desire to expand services from the Big Island into the Oahu and Maui marketplaces"; (3) there is a shortage of qualified drivers holding commercial drivers licenses to meet the current needs of transportation companies in addition to meeting Jack's expansion needs; (4) Jack's is overextending its motor carrier operations as evidenced by its "aggressive and proactive posture against even small carrier entry by others" on the Big Island; (5) "no other party can protect [E Noa's] interests or the interests of [its] customers in this matter"; and (6) E Noa's participation in the instant proceeding will assist in the development of a sound record, and will not broaden the issues or delay the proceeding.²⁴

²²Id. at 8 (citing In re Roberts, Docket No. 96-0462).

²³Id.

²⁴Id. at 9-10.

On September 6, 2005, Jack's filed a Statement of Opposition to E Noa Corporation's Motion to Intervene ("Jack's Opposition to E Noa Motion").²⁵ It contends that E Noa's request for intervention consists of "falsehoods based on mistaken assumptions and improper inferences."²⁶ Jack's contends that E Noa's Motion should be denied on the following grounds: (1) E Noa's contention that it is uncertain whether Jack's is applying for irregular or regular route authority is a "red herring that is not reasonably pertinent to the actual issues" of the instant proceeding; (2) E Noa's focus on Jack's possible utilization of trolley type vehicles is pure speculation "based on an improper inference drawn from a non-fact"; (3) E Noa's attempt "to draw some type of inconsistency between prior statements apparently made by Jack's in other proceedings before [the commission] . . . is another red herring that should be ignored by the [c]ommission, and lends no support as to the merits of [E Noa's] request to intervene"; (4) E Noa seeks "to prejudge and thereby frame what the relevant issues of this case will be" by its conjecturing as to the case Jack's will make against existing carriers; (5) E Noa "should not have the right to shoot off wild allegations about [Jack's] financial capabilities," citing E Noa's "comments and speculation" regarding Jack's financial fitness; (6) speculative comments

²⁵On October 7, 2005, Jack's filed an Errata Sheet to its Statement of Opposition to the E Noa Motion in which it corrected certain typographical errors contained in the Statement of Opposition to the E Noa Motion.

²⁶Jack's Opposition to E Noa's Motion at 6.

regarding E Noa's interest in the instant proceeding do not meet the requirements set forth in HAR § 6-61-55 for a grant of intervention; (7) E Noa's participation in this proceeding will unreasonably broaden the issues and will not assist the commission in its decision-making process; and (8) the commission "has recently taken a position of near uniform denial of attempts to obtain intervenor or participant status in motor carrier service proceedings."²⁷

7.

VIP

On August 25, 2005, VIP filed a motion to intervene in the instant proceeding ("VIP's Motion"). According to VIP's Motion, it is a "duly certificated common carrier by motor vehicle in the passenger classifications 1-to-7, 8-to-25 and over-25 on the island of Oahu."²⁸ VIP asserts that it has an interest in the instant proceeding because the services proposed to be rendered by Jack's "will be competing directly with VIP."²⁹ VIP also fears that direct competition by Jack's will result in decreasing numbers of passengers being carried by VIP, and as a consequence, a loss of revenue to VIP. VIP argues that granting

²⁷Id. at 2-9.

²⁸VIP's Motion at 1.

²⁹Id. at 2.

Jack's Application will not foster sound economic conditions within the transportation industry.³⁰

On September 6, 2005, Jack's filed a Statement of Opposition to V.I.P. Transportation, Inc.'s Motion to Intervene ("Jack's Opposition to VIP's Motion"). According to Jack's, VIP's Motion does not contain the factual support required by HAR § 6-61-55 for commission approval of the Application and "VIP is not simply authorized to make broad, conclusory demands for relief."³¹ Additionally, Jack's contends that the commission "has recently taken a position of near uniform denial of attempts to obtain intervenor or participant status in motor carrier service proceedings" and cites numerous instances where the commission has denied Jack's intervenor status in motor carrier applications.³²

8.

Polynesian

On August 25, 2005, Polynesian filed a motion to intervene in the instant proceeding ("Polynesian's Motion"). According to Polynesian, "it is a common carrier by motor vehicle authorized to operate in the 8-to-25 and over-25 passenger classifications on the islands of Oahu, Maui, Hawaii and Kauai."³³

³⁰Id.

³¹Jack's Opposition to VIP's Motion at 2.

³²Id. at 3.

³³Polynesian's Motion at 2.

Polynesian asserts that it is concerned with Jack's proposed expansion of motor carrier service to Maui and Oahu "where margins are slimmer and the markets oversaturated with carriers."³⁴ Polynesian contends that in the past, it has farmed out substantial business to Jack's on the Big Island and that it has had problems with Jack's services, including situations where Jack's does not confirm that it will take a "farm out" or lets Polynesian know in an untimely fashion that it will not take the "farm out," leaving Polynesian to scramble at the last minute to arrange transportation service for its customers.³⁵

Polynesian opposes approval of Jack's request for extension of its motor carrier service for the following reasons: (1) it appears that Jack's is attempting to position itself as a large player in the Hawaii transportation industry, and this will have a "substantial negative impact on existing motor carriers and transportation services on Oahu and Maui"; (2) Polynesian expects that Jack's "will try to present a case against Oahu's and Maui's current carriers in an effort to discredit their facilities and services to the public," and as such, Polynesian has no choice but to intervene to aid the commission in understanding existing transportation services; (3) Polynesian has substantial property, financial and other interests at stake; (4) Polynesian claims that it has invested significant amounts of money in its vehicles (in excess of \$8 million on Maui and Oahu

³⁴Id. at 3.

³⁵Id.

alone), and for the housing and maintenance of these vehicles; (5) Polynesian questions whether Jack's is financially fit to withstand a downturn in the transportation industry in light of what it describes as an apparent overextension of Jack's business; (6) Polynesian will be directly impacted by Jack's proposed extension on Maui and Oahu in that Jack's seeks to offer the same services, in the same locations, using similar vehicles; (7) approving Jack's request to expand its motor carrier services may serve to destabilize the motor carrier marketplace; (8) Jack's does not appear to have any vehicles in the 1-to-7 passenger category, for which it has applied for commission approval; (9) there is a lack of qualified drivers possessing a commercial driver's license; (10) Jack's is inconsistent in its positions as it has argued that there is very little motor carrier business available on the Big Island, yet in this instance, Jack's appears to be over-reaching in its proposed business expansion; and (10) Polynesian's participation will assist in the development of a sound record and will not broaden the issues or delay the instant proceeding.³⁶

On September 6, 2005, Jack's filed a Statement of Opposition to Polynesian Adventure Tours, Inc.'s Motion to Intervene ("Jack's Opposition to Polynesian's Motion")³⁷ in which

³⁶Id. at 4-12.

³⁷On October 7, 2005, Jack's filed an Errata Sheet to its Statement of Opposition to the Polynesian Motion in which Jack's corrected certain typographical errors contained in its initial submission ("Errata Sheet"). On October 11, 2005, Jack's filed an Amended Certificate of Service to the Errata Sheet.

Jack's argues that intervention status should be denied to Polynesian for the following reasons: (1) the purported "facts and reasons" cited by Polynesian to support its position is based on a misguided view of what Polynesian believes Jack's intentions are in obtaining an approval of its expansion request; (2) Polynesian's reference to its negative experience farming out its business to Jack's is dated and not relevant to the issues in the instant proceeding; (3) Polynesian's contention that it is uncertain whether Jack's is applying for irregular or regular route authority is a "red herring that is not reasonably pertinent to the actual issues" of the instant proceeding, which "improperly and unnecessarily broadens the . . . issues"; (4) Polynesian's attempt "to draw some type of inconsistency between prior statements apparently made by Jack's in other proceedings before [the commission] . . . is another red herring that should be ignored by the [c]ommission, and lends no support as to the merits of [Polynesian's] request to intervene"; (5) Polynesian makes incorrect assumptions regarding what Jack's will or will not do in the process of attempting to obtain approval of its Application, and in doing so, seeks to improperly frame the issues in the instant proceeding; (6) "[Polynesian's] claim that [Jack's] is overextended and that (sic) the inference therein that it will go bankrupt are outrageous" and are based totally upon speculation in addition to being "totally misguided and highly inappropriate"; (7) Polynesian's interest in the instant proceeding is not substantial, but merely speculative, and thus does not meet the standard for intervention in HAR

§ 6-61-55; (8) the speculative, irrelevant and erroneous positions that Polynesian has raised in its effort to intervene in this proceeding shows that its participation will unreasonably broaden the issues already presented; and (9) the commission "has recently taken a position of near uniform denial of attempts to obtain intervenor or participant status in motor carrier service proceedings."³⁸

C.

Hearing on Motions to Intervene

As none of the Movants requested a hearing, no hearing was held on the motions to intervene.

II.

Discussion

It is well established that intervention as a party in a commission proceeding "is not a matter of right but is a matter resting within the sound discretion of the commission." See In re Application of Hawaiian Elec. Co., Ltd., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975); see also In re Paradise Merger Sub, Inc. et al., Docket No. 04-0140, Order No. 21226 (Aug. 6, 2004).

HAR § 6-61-55 sets forth the requirements for intervention. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion

³⁸Jack's Opposition to Polynesian's Motion at 2-10 (internal quotation marks omitted).

in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.

(b) The motion shall make reference to:

- (1) The nature of the applicant's statutory or other right to participate in the hearing;
- (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
- (3) The effect of the pending order as to the applicant's interest;
- (4) The other means available whereby the applicant's interest may be protected;
- (5) The extent to which the applicant's interest will not be represented by existing parties;
- (6) The extent to which the applicant's participation can assist in the development of a sound record;
- (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

HAR § 6-61-55(a) and (b). Section 6-61-55(d), HAR, however, states that "[i]ntervention *shall not* be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." (Emphasis added).

After reviewing the entire record in the instant proceeding, the commission finds the allegations set forth by

Movants are not reasonably pertinent to the resolution of the Application and that intervention by any or all of the Movants would unreasonably broaden the issues already presented. Notwithstanding that Jack's proposed service may be in competition with any of the Movants' current motor carrier service, it does not necessarily follow that their business interest will suffer from Jack's proposed expansion.

Movants, moreover, have other means by which to protect their market share. For example, they could offer better service than their competitors or more competitive pricing. See In re Robert's Tours & Transp., Inc., 104 Hawai'i 98, 109, 85 P.3d 623, 634 (Haw. 2004) (affirming the commission's decision to grant a motor carrier authority to operate where "it would encourage competition and constrain otherwise monopolistic operations"). Movants' participation as intervenors, moreover, is only likely to delay the proceeding and will not assist the commission in developing a sound record.

For the foregoing reasons, we conclude that the motions to intervene should be denied.

III.

Order

THE COMMISSION ORDERS:

(1) PHT's Motion to Intervene, filed on August 15, 2005, is denied;

(2) Akina Aloha's Motion to Intervene, filed on August 22, 2005, is denied;

(3) Akina Bus' Motion to Intervene, filed on August 22, 2005, is denied;

(4) Robert's Motion to Intervene, filed on August 22, 2005, is denied;

(5) KIT's Motion to Intervene, filed on August 25, 2005, is denied;


(6) E Noa's Motion to Intervene, filed on August 25, 2005, is denied;

(7) VIP's Motion to Intervene, filed on August 25, 2005, is denied; and

(8) Polynesian's Motion to Intervene, filed on August 25, 2005, is denied.

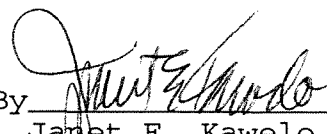
DONE at Honolulu, Hawaii FEB 28 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

By 
Janet E. Kawelo, Commissioner


Benedyne S. Stone
Commission Counsel

05-0159.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22301 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Certificate of Service
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DATED: FEB 28 2006